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The Rome Statute on the International Criminal Court—Universal Jurisdiction or State Consent—To Make or Break the Package Deal

Sharon A. Williams

THE 1998 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,¹ is a massive document containing one hundred and twenty-eight Articles. The International Criminal Court (ICC) will have under its mandate some of the most serious international crimes known to humankind. It is intended to serve the triple function of deterrence, prosecution of alleged perpetrators, and justice for victims. By individualizing guilt, the ICC will have the potential effect of searching for truth and assisting in peace and reconciliation. It is hoped that the providing of accountability will end the cycle of impunity, protect the fundamentals of human dignity, and work for peace. Deciding where my focus should be for this contribution to honour my colleague, friend, and mentor in many ways in the international criminal law field, Professor L.C. Green, was a difficult choice. I decided to pick what turned out to be one of the most, if not the most, controversial Article at the end of the Conference—Article 12.

Article 12 of the 1998 Statute of the International Criminal Court, dealing with the preconditions for the actual exercise of criminal jurisdiction, is fundamental to an effective International Criminal Court. The views of States on this issue were wide-ranging. Until the proverbial eleventh hour on July 17, 1998, in Rome, where, under the Rules of Procedure of the Conference, the text had to be adopted by midnight, Article 12 was still a make or break provision. Even subsequent to the adoption of the Statute, it retains its notoriety.²

Article 12 is intimately related to Article 5 on crimes within the jurisdiction of the ICC, Article 13 on exercise of jurisdiction, Article 17 on complementarity, and Article 124 on the transitional provision. In effect, these provisions dealing with the intertwined aspects of jurisdiction "were the most complex and most sensitive, and for that reason remained subject to many options as long as possible."³ They were, beyond doubt, indicative of the necessity to adopt a package-deal. The approach taken is firstly that the offence *ratione materiae* is found in the list of core crimes contained in Article 5 and defined in Articles 6, 7 and 8. Secondly, the preconditions for the ICC exercising jurisdiction in the specific case must be met. Thirdly, the case must be initiated in accordance with the provisions of Article 13.

From the Draft Statute of the International Law Commission (ILC)⁴, to the Draft Statute prepared by the Preparatory Committee⁵ (PrepCom), and finally to the negotiations at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from June 15–July 17, 1998,⁶ a fundamental issue during all stages of the debate was whether in cases other than where the situation was referred to the Prosecutor by the United Nations Security Council, acting under Chapter VII of the United Nations Charter,⁷ the ICC would have vested in it inherent jurisdiction to prosecute the core crimes of genocide, war crimes, crimes against humanity and aggression, listed in Article 5, on account of ratification or acceptance of the Statute. Alternatively, would State consent be a precondition, and, if so, for which crimes, on what basis, and by which State or States?

The aim of this short Article is to analyse Article 12, which sets forth preconditions to the exercise of jurisdiction by the ICC, by considering the various options that were put on the table, beginning with the work of the International Law Commission, followed by the *Ad Hoc* Committee and the Preparatory Committee (PrepCom) set up by the United Nations General Assembly, and culminating in the negotiations during the Rome Diplomatic Conference. It is only through this chronological progression that one can see the divergent perspectives of States and the ultimate compromise that was struck to save the Statute in the final stages of the Rome Conference.

The Route to Rome

The Early Years. The establishment of an international criminal court has been on the agenda of the international community since at least the time of the League of Nations. Although there are examples of war crimes and crimes against peace prosecutions stemming from the thirteenth century in Europe,⁸ the contemporary impetus to establish an international criminal court may be said to have originated from the century old 1899 first Hague Convention for the Pacific Settlement of International Disputes.⁹ However, it was the 1919 Treaty of Versailles¹⁰ that saw for the first time an attempt at the prosecution of war crimes. Attempt is the operative word, as Kaiser Wilhelm II remained in the Netherlands where he had sought asylum, and the other prosecutions were eventually with the agreement of the allies brought before the German Supreme Court in Leipzig.¹¹

In 1937 the League of Nations attempted to bring into operation a multilateral Convention for the Prevention and Punishment of Terrorism and an annexed Protocol on the Establishment of an International Criminal Court to deal with such offences.¹² Neither came into force.¹³ However, in 1945, the allied powers adopted the London Charter¹⁴ and set up the International Military Tribunal which sat at Nuremberg. It provided a forum for the trials of the major axis war criminals whose crimes had no precise geographical location. A tribunal was set up on similar lines in Tokyo for the far east theatre of war.¹⁵ These two tribunals were *ad hoc* with a determined time frame—the war period that had just ended. They were not truly “international” in character, with the judges and prosecutors being drawn only from France, the United Kingdom, the United States, and the former U.S.S.R. Nevertheless, the Nuremberg Charter, Judgment and the Principles extrapolated therefrom by the International Law Commission and accepted by the United Nations General Assembly¹⁶ are an extremely pertinent precedent. This was the first task given the ILC, which had been created by the General Assembly in 1947. It was also mandated to formulate a Draft Code of Offences Against the Peace and Security of Mankind and “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide and other crimes.”¹⁷

The conclusion of the ILC was that such a body was desirable and possible. In 1950 the General Assembly established a Committee on International Criminal Jurisdiction to prepare a concrete proposal. A draft statute was submitted in 1951, and amended in 1953, but was not accepted, ostensibly because of a failure to agree on an acceptable definition of the crime of aggression.¹⁸

Even though this was done by the General Assembly in 1974,¹⁹ still the matter of the ICC remained dormant.

The ILC Draft. The 1994 Draft Statute²⁰ for an international criminal court produced by the International Law Commission was complicated and geared towards producing a court that would operate on a restrictive consent basis and with strict Security Council control under Article 23. Article 21 (1) (a) provided for inherent jurisdiction in a case of genocide, with no additional requirement of acceptance.²¹ However, Article 21 (1) (b) stipulated that the Court could exercise its jurisdiction for the other crimes referred to in Article 20—namely aggression, war crimes, crimes against humanity, and certain treaty crimes—where the complaint was brought in accordance with Article 25 (2) and the jurisdiction of the Court over the particular crime was accepted under Article 22 by the custodial State and by the State on the territory of which the act or omission in question occurred, a type of “ceded jurisdiction.”²² The term “custodial State” was intended to cover not only the situation where a State has detained a person or has the person in its control, but also would extend to a State the armed forces of which are visiting another State. In the latter case, where a member of the visiting force is suspected of a crime the State to which the force belongs would be classified as the “custodial State.” The inclusion of treaty crimes based on the various international terrorism conventions²³ and the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances²⁴ rendered it broader than Article 5 of the Rome Statute as adopted. In a case where the custodial State had received a request²⁵ under an international agreement from another State to surrender a person for the purposes of prosecution, unless the request was rejected, acceptance by the requesting State of the Court’s jurisdiction was required. Article 22 of the ILC Draft detailed the modalities of acceptance by States Parties. It can be classified as an “opting in” system with States specifying the crimes for which jurisdiction was accepted.²⁶ The Court did not have inherent jurisdiction, therefore, based on a State ratifying or acceding but, instead, needed a special declaration issued either at the time of becoming a Party or later. The ILC was of the view that this best reflected its general approach to the Court’s jurisdiction,²⁷ that it is based on State consent with the “Court intervening upon the will of the States concerned, rather than whenever required for protecting the interests of the international community.”²⁸ Article 23 (1) provided for referral to the Court by the United Nations Security Council acting under Chapter VII of the UN Charter for crimes referred to in Article 20. With respect to aggression, Article 23 (2)

detailed the prerequisite that the Security Council first determine that a State had committed aggression before a complaint of, or directly related to, an act of aggression could be brought. In conclusion, the consent regime in the ILC Draft was criticized as being "complicated and cumbersome at best [and likely] to cripple the proposed Court at worst."²⁹ This being said, it must be realized that the ILC, based on the past views of States' expressed in the Sixth Committee of the General Assembly on its annual Reports, was cognizant of the fact that the "instrument providing for an international criminal jurisdiction must take into account current international realities . . . that the establishment and effectiveness of the court required the broad acceptance of the statute by States."³⁰

The PrepCom Draft. In both the *Ad Hoc* Committee³¹ set up by the UN General Assembly to review the ILC 1994 Draft Statute and in the PrepCom established in 1996,³² the same fundamental questions were raised. In the PrepCom there was widespread, albeit not uniform, agreement that there should be inherent jurisdiction over genocide.³³ However, as in the *Ad Hoc* Committee, there were different views on whether war crimes and crimes against humanity should be so treated.³⁴ States supporting inherent jurisdiction for all core crimes underscored the need for it because of the gravity of the crimes. On the other hand, those States who were opposed stressed the consensual nature of the Court and the necessity of such to obtain maximum State support. The maintenance of State sovereignty was key to this position. In fact, some States argued that the preconditions of State consent set out in Article 21 (1) (b) of the 1994 ILC Draft should have been more expansive, including also the mandatory consent of the States of nationality of the accused and the victim.

In the Draft Report of the Intersessional Meeting in Zutphen,³⁵ which was produced to facilitate the last PrepCom session, the options on jurisdictional preconditions were contained in Articles 6 [21] and 7 [21 bis] as produced by the Working Groups of the PrepCom.³⁶ The Articles had square brackets indicating again various alternatives and the diverse views of States.

Rome 1998—The Options

The several options contained in the Draft Statute³⁷ finalized at the last session of the PrepCom on April 3, 1998, were put before delegations in the Committee of the Whole (CW). Broadly speaking, these can be categorized as "the German Proposal," "the Korean Proposal," "the United Kingdom Proposal,"

"the United States Proposal," and the "opt-in" and "case-by case" consent regimes.³⁸ These proposals ranged from universal jurisdiction for the ICC proposed by Germany and automatic jurisdiction using broad bases of jurisdiction by South Korea at one end of the spectrum to the restrictive mandatory consent of all interested States preferred by certain other delegations. The Bureau discussion paper tried to narrow the options, as did its subsequent proposal, while still retaining alternatives.³⁹ The final package struck a compromise. Nevertheless, the then entrenched positions of some delegations proved to be irreconcilable. The result was that the consensus approach to adoption was thwarted and an unrecorded vote in plenary was called for late on July 17, 1998. The Statute was adopted by 120 in favour to 7 against with 21 abstentions. Article 12 as adopted is not as restrictive as it could have been. Yet it still requires, where the prosecutor acts *proprio motu* or where States, rather than the UN Security Council acting under Chapter VII of the Charter, refer a situation, that either the territorial State where the crime was committed or the State of nationality of the accused be Parties. If non-State Parties are involved, they may accept the exercise of jurisdiction by the ICC for the crime in question.

The German Proposal. The German proposal was based on the rationale that States individually have a legitimate basis at international law to prosecute the core crimes listed in Article 5 on account of universal jurisdiction. It was submitted that the ICC should have the same capacity as contracting States. This would have been appropriate for a permanent International Criminal Court being founded for the good of the international community of States as a whole. The proposal was contained in Article 9 (1), further option, of the Draft Statute before the CW.

It is a well-established rule of customary⁴⁰ and conventional⁴¹ international law that certain criminal conduct is against the universal interest, offends universal conceptions of public policy, and is universally condemned. Thus, the perpetrators are *hostis humanis generis*, enemies of humankind. Any State obtaining custody over them has a legitimate ground to prosecute in the interest of all States on account of the universal basis of jurisdiction over the offence. States have "the legal competence and jurisdictional competence to define and punish particular offences, regardless of whether that State had any direct connection with the specific offences at issue."⁴² It appears to merge jurisdiction over the person with jurisdiction over the offence.⁴³ In this way, such serious and heinous crimes will not escape justice by falling into a jurisdictional vacuum. There is no requirement that any other State or States involved in some way through territorial location of the crime or nationality of the accused or

victims must consent. The origins of the principle of universal jurisdiction can arguably be traced to international piracy,⁴⁴ the slave trade⁴⁵ and more latterly to war crimes,⁴⁶ crimes against humanity,⁴⁷ and genocide.⁴⁸ Most recently, the prosecutions before the *Ad Hoc* International Criminal Tribunals for the Former Yugoslavia (ICTFY) and Rwanda (ICTR) illustrate this fundamental principle. For example, as explained in the *amicus curiae* brief presented by the United States in the *Tadic* case, "The relevant law and precedents for the offences in question here—genocide, war crimes and crimes against humanity—clearly contemplate international as well as national action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all States, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals."⁴⁹

More recently, in *Prosecutor v. Furundzija*, the ICTFY stated that the prohibition against torture has "evolved into a peremptory norm or *jus cogens*. . . Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community."⁵⁰ As well, Lord Browne Wilkinson, speaking with the majority in the House of Lords in *Regina v. Bartle et al., ex parte Pinochet*, held that "the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed."⁵¹

The German proposal attracted strong support from some delegations⁵² and from many of the NGOs.⁵³ The view central to this proposal was that to limit the potential of the ICC by requiring some form of State consent beyond ratification would detract from the effectiveness of the Court and even its rationale and philosophical underpinnings. Thus, the impact of the German proposal would have been to give the ICC universal jurisdiction⁵⁴ over the listed crimes with no need for a separate consent of interested States. As Germany indicated in Rome,⁵⁵ the universal principle's application would have eliminated loopholes. For example, if consent of at least the territorial State was necessary and if genocide was committed in State X against nationals of State X, and X is not a Party to the Statute and the United Nations Security Council does not refer the matter to the ICC acting under Chapter VII of the United Nations Charter,⁵⁶ the crime would not be cognizable by the Court. Similarly, it is true that in the case of internal armed conflicts, the territorial State and State of nationality will often be one and the same. The ICC would only have jurisdiction if that State had become a State Party before the conflict, agreed *ad hoc* due to domestic political procedures, or if the Security Council acted under Chapter VII.⁵⁷ As well, the restrictions of State consent would mean that even where

the custodial State was a Party to the Rome Statute and wanted to surrender the accused to the ICC, the Court would not be able to exercise jurisdiction without the consent of the other involved States.

If the German proposal had been marketable in Rome, the end result would have been the deletion of Article 12 [Article 7 in the Draft Statute] on preconditions. Related to this issue, it must be emphasized, is the safeguard contained in Article 17 on complementarity. The ICC would have only exercised such universal jurisdiction where a national system was unwilling or unable to investigate and/or prosecute effectively. Therefore, the universal principle would not have divested national criminal courts of their primary role in prosecutions of listed crimes.

Clearly, the universal principle would have given jurisdiction to the ICC if the core crimes were committed in the territory of any State, Party or non-Party to the Statute. However, non-States Parties would have been under no international legal obligation to cooperate with the Court. Therefore, the second prong of the German proposal contained in Article 9 (2) further option was that non-States Parties may accept the obligation to cooperate on an *ad hoc* basis with respect to any listed crime.⁵⁸

The Korean Proposal. Sensing opposition to the German concept of universal jurisdiction, the Republic of Korea's proposal⁵⁹ appeared two days into the Conference on June 17, 1998. It provided for so-called automatic jurisdiction. The Korean view was that by becoming a Party a State would be considered to have accepted the jurisdiction of the ICC. The jurisdictional nexus was that any one or more of four involved States Parties have consented to the Court exercising jurisdiction over a case: either the territorial State, State of nationality of the accused, State of nationality of the victim, or custodial State. This proposal differed from those that follow in that it allowed for the selective consent by ratification of one of the four States, including the custodial State. In real terms, there was no difference in philosophy between the German and Korean proposals, as the universal principle is based solely upon the alleged perpetrator being in the custody of the prosecuting State. The Korean proposal enjoyed wide support,⁶⁰ but was not acceptable to many States who wanted a second layer of State consent.⁶¹

The United Kingdom Proposal. The United Kingdom,⁶² in further option for Article 7 (1), provided for jurisdiction by States Parties of the ICC for crimes listed in Article 5, with necessarily the same built-in safeguard of complementarity discussed above. However, in Article 7 (2), a further requirement

where the situation was referred by a State Party to the Court or where the Prosecutor initiated a prosecution *proprio motu* was that both the custodial State and the State where the crime occurred consented to the jurisdiction of the ICC by being States Parties. Concern had been expressed that to get the cumulative consents would be difficult.⁶³ On June 19, 1998, the proposal was amended to delete the custodial State.

The United States Proposal. In cases where a situation had been referred to the ICC by a State Party or where the Prosecutor had initiated an investigation, the United States supported⁶⁴ as fundamental the consent of the territorial State and the State of nationality of the accused person, or at a minimum only the consent of the State of nationality.⁶⁵ The United States insisted that the ICC have no jurisdiction over the nationals of States that had not become a Party to the Statute. It was argued that to do so would violate Article 34 of the 1969 Vienna Convention on the Law of Treaties,⁶⁶ as treaties cannot be binding on non-Party third States. The position was that it would not be acceptable for United States citizens to be accountable in a court not accepted by the United States. The United States made it clear that it could not adhere to a text that allowed for United States forces operating abroad to be brought even conceivably before the ICC, where the United States had not become a Party to the Statute. The United States position was that this would derogate from the ability of the United States to act as a major player in multinational humanitarian and peacekeeping operations. Protection against frivolous and arbitrary charges and other forms of inappropriate investigations and prosecution was called for. It is worth observing, however, that the passive personality basis of jurisdiction included in the Korean proposal would have been a protective deterrent for such forces in giving jurisdictional acceptance to the State of nationality of victims.

Of course, the United States position still left open referral of a situation by the UN Security Council acting under Chapter VII of the Charter as provided for in Article 13(b) of the Statute, subject of course to the veto of one of the P5. This, in the United States' view, was the only way "to impose the court's jurisdiction on a non-Party State."⁶⁷ The proposal would have resulted in an ICC controlled by the Security Council, a type of permanent *ad hoc* criminal tribunal.⁶⁸

The United States position on the indispensable requirement of the acceptance of the State of nationality of the accused was not acceptable to the overwhelming majority of States as it was seen as causing a probable paralysis of the ICC. The U.S. concerns were not assuaged by the provisions on complementarity

contained in Article 17 of the Statute or on judicial cooperation in Article 98(2), which requires consent of the sending State as a precondition for the surrender to the ICC by the "host" State of persons present in that State pursuant to international agreements. This would have meant that U.S. forces on, for example, peace-keeping or other missions abroad under Status of Forces Agreements would not have been susceptible to prosecution before the ICC unless the United States consented.

State "opt-in" and Case-by-Case Proposals. The State "opt-in" proposal in Article 6(2), Article 7, option 1, and Article 9, option 1, of the Draft Statute was markedly different from the previous proposals as it required an actual second consent other than being a Party to the Statute. This declaration of consent over specified crimes could have been placed at the time of ratification or at a later stage. The thrust of the proposal was that before the ICC could assume jurisdiction, as many as five States potentially would have had to have consented to the exercise of jurisdiction by the Court over the crime in question: the custodial State; the territorial State; the State that had requested extradition of the person from the custodial State, unless the request was rejected; the State of nationality of the accused; and the State of nationality of the victim. The ICC would have been less competent under this proposal than States currently are under conventional and customary international law to prosecute domestically, where the consent of other involved States is not necessary.⁶⁹

The case-by-case approach contained in Article 7, option 2 of the Draft Statute would have needed the specific consent of the States outlined above in the "opt-in" proposal. Ratification would, therefore, have had little meaning in practical reality and States would have been able to make any individual immune from consideration of the Court when it seemed politically desirable. This proposal would have rendered the ICC ineffective in many cases.

In effect, both the "opt-in" and case-by-case proposals based on a second State consent would have been jurisdiction "à la carte." They would have resulted in practical terms in a significantly weakened Court, with the ICC most often only having jurisdiction when the UN Security Council referred a situation to it, with the built-in Charter problem of the veto power of the P5. This would have been particularly so should both proposals have been adopted and States had preferred to follow the case-by-case approach. States, as a result, could have ratified with no intention of ever allowing cases to go before the Court. This would have resulted in an ineffectual Court and as well have "foment[ed] selectivity and arbitrariness."⁷⁰

The Bureau Compromise

The Bureau discussion paper⁷¹ “had narrowed the range of options but had deliberately taken a cautious approach.”⁷² The Proposal⁷³ had likewise retained several options. Both of these had dropped the German Proposal.⁷⁴ The Bureau Proposal in Article 7(1) adopted the Korean Proposal for genocide alone. For war crimes and crimes against humanity, three options were presented in Article 7(2): (1) the Korean Proposal, (2) the acceptance by the territorial and custodial States, and (3) the acceptance by the State of nationality of the accused alone. Some States voiced strong objections against the Korean Proposal stating that it was quasi-universal jurisdiction. It gave the ability to four States, including the custodial State as a State Party, to give the Court jurisdiction standing alone. However, other States pointed out that it would have been in keeping with the ability at international law of the custodial State to prosecute itself for international crimes, *stricto sensu*. They viewed the other options as too restrictive, in particular option 3 based on the State of nationality of the accused. As well, Article 7 *bis* on acceptance of jurisdiction, in both the discussion paper for treaty crimes, and possibly for one or more of the core crimes, and in option 2 of the Proposal for crimes against humanity and war crimes, was controversial as it replicated the “opt-in” regime. Article 7 *bis* option 1 reproduced the automatic jurisdiction over all core crimes by States Parties. Thus, as late as July 10, 1998, with only one week left, there was no consensus. The United States and other States emphasized that “universal jurisdiction or any variant of it” was unacceptable.⁷⁵

The result was the introduction on July 17, 1998, into the final package by the Bureau of a new Article on preconditions, the present Article 12 in the Statute. It provides:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5.
2. In the case of Article 13, paragraph (a) or (c), [referral of a situation to the ICC by a State Party or an investigation by the Prosecutor *proprio motu*] the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

This Article combines State acceptance of jurisdiction with preconditions for the exercise of jurisdiction by the ICC. It disjunctively allows for the acceptance by being States Parties of one or more of the territorial State or the State of nationality of the accused. The transitional provision contained in Article 124 was also part of the compromise to gain the agreement of France to the Statute.⁷⁶ It provides that States Parties may opt out of the ICC's war crimes jurisdiction for a period of seven years when the alleged crimes were committed on its territory or by its nationals. States that had lobbied for the "opt-in" acceptance and the preconditional conjunctive approach or solely the State of nationality of the accused remained opposed. From the outset, issues of jurisdiction had been a key concern for the United States.⁷⁷ For the United States it was the four words "one or more of" in Article 12(2) that caused the ultimate dissent. It was on this issue that the United States proposed an amendment during the last hours of the Conference in the CW.⁷⁸ It read:

With respect to States not party to the Statute the Court shall have jurisdiction over acts committed in the territory of a State not party, or committed by officials or agents of a State not party in the course of official duties and acknowledged by the State as such, only if the State has accepted jurisdiction in accordance with this Article.

The amendment was resoundingly defeated by a no-action motion,⁷⁹ adopted by 113 in favour to 17 against, with 25 abstentions. In the plenary that followed, the United States requested an unrecorded vote. The result was 120 in favour with 7 against and 21 abstentions. Those voting against included China, Israel and the United States.

Article 12—An Interpretation

By becoming parties to the Statute, States accept the jurisdiction of the ICC for the crimes of genocide, crimes against humanity, war crimes and aggression, when the latter has been defined and adopted in accordance with Article 5 (2).⁸⁰

Article 12(1) follows option 1 of the Bureau Proposal in Article 7 *bis*. It, therefore, assumes the position of automatic jurisdiction over the listed crimes.

In cases where, pursuant to Article 13 (a) or (c), a situation is referred to the Prosecutor by a State Party⁸¹ or where the Prosecutor has initiated an investigation *proprio motu*,⁸² State acceptance is necessary. As discussed above, this complex and controversial issue resulted at the end of the day in a compromise put to the CW in the final package. It was an attempt by the Bureau to find a middle ground between the opposite positions of States—between, on the one hand, those who had for the most part a preference for universal jurisdiction or a list of alternative States (territorial State, State of nationality of the accused or the victim, and custodial State), where it was sufficient that one had accepted the Court's jurisdiction by ratifying, and, on the other, those who insisted on either State Party acceptance of the State of nationality of the accused or even the stricter requirement that there be acceptance conjunctively from a list of States as had been proposed in the ILC Draft.⁸³ Article 12 as adopted by the Conference is the accommodation that was struck. It reduced the preconditions. The jurisdictional nexus is that either the territorial State or the State of nationality of the accused are States Parties. These are the two primary bases of jurisdiction over the offence accepted by States in international criminal law and are universally accepted.⁸⁴

State with territorial jurisdiction. Territorial jurisdiction is a manifestation of State sovereignty.⁸⁵ A State has plenary jurisdiction over persons, property, and conduct occurring in its territory, subject only to obligations or limitations imposed by international law.⁸⁶ This is the universally accepted working rule in international criminal law and is found in bilateral extradition treaties and multilateral conventions.⁸⁷ The territory of a State includes its land mass, internal waters, twelve-nautical-mile maximum territorial sea, and the airspace above all of the former. Jurisdiction is recognized in customary and conventional international law as also extending to conduct committed on board maritime vessels and aircraft registered in a State.⁸⁸ Thus, if a listed crime is committed in State A, a State Party to the ICC Statute, by a national of State B, whether or not State B is a State Party, State A will have enabled the ICC to take jurisdiction. This is so regardless of whether the alleged offender is present in State A or in another custodial State Party.⁸⁹

The ICC is not, as has been argued by the United States, therefore potentially taking jurisdiction over non-States Parties. It is not violating Article 34 of the Vienna Convention on the Law of Treaties,⁹⁰ which provides that treaties cannot bind third parties without their consent. When an alien commits a

crime, whether a domestic common crime or an international crime, on the territory of another State, a prosecution in the latter State is not dependent on the State of nationality of the accused being a Party to the pertinent treaty or otherwise consenting.⁹¹ It is not a case of a non-State Party being bound, but rather of the individual being amenable to the jurisdiction of the ICC because of alleged crimes committed in the territory of a State Party. There is no rule of international law prohibiting the territorial State from voluntarily delegating to the ICC its sovereign ability to prosecute, by becoming a State Party of the Statute.⁹²

State of nationality of the accused. The active nationality basis of jurisdiction over the offence is well-entrenched in the domestic law of the majority of States. By virtue of such State practice and *opinio juris*, it is a permissive rule derived from international custom that establishes extraterritorial jurisdiction.⁹³ Civil law jurisdictions provide for its use extensively and relate it to common crimes of a domestic nature, as well as to international crimes against the common interests of States. It is a corollary to the rule concerning the non-extradition of nationals applied by these States. Common law States, on the other hand, use the nationality basis for the most part only with regard to international crimes, *stricto sensu*, such as are prescribed by international law as envisaged in Article 5 of the Rome Statute and international treaty crimes, like those contained in the international terrorism conventions.⁹⁴ In this context it is universally accepted.

Non-States Parties. In the case of non-State Parties, Article 12(3) follows the ILC Draft, the PrepCom Draft Statute,⁹⁵ and the Bureau Discussion Paper,⁹⁶ and Proposal.⁹⁷ It provides that if such a State's acceptance is required under the preceding paragraph, it may declare *ad hoc* its acceptance with respect to the crime in question. Such a State is then obligated to cooperate with the ICC in accordance with Part 9 of the Statute. Thus, the Statute does not infringe upon the sovereignty of non-Party States. It is in compliance with the customary and conventional rules on the law of treaties. It is, therefore, a misconception that the Statute binds non-Parties. They are not obligated to cooperate with the ICC.

Article 12 is a product of compromise supported by the overwhelming majority of States. It endeavours to satisfy the many interests that were in evidence at the Rome Conference and before. Although far from perfect, it was all that was possible at the time. That the acceptance of the Statute

by the custodial State does not act as a precondition for the exercise of jurisdiction by the ICC is a serious gap.⁹⁸ It is this provision that would have ensured that atrocities will not go unpunished if the territorial State or State of nationality are not Parties or do not consent *ad hoc* and there is no UN Security Council referral. In all probability it may be assumed that the States likely to be the *locus delicti* of such crimes or whose nationals are suspect will not be among the first to ratify or otherwise agree to be bound by the Statute, if ever. Initially, at least once the ICC is operative after the 60 ratifications have been deposited, reliance will have to be placed on the Security Council in such cases. It is ironic to hear the argument following the adoption of the Statute that Article 12 as it stands, in effect without universal jurisdiction (the German Proposal) or automatic jurisdiction including the acceptance as a State Party by the custodial State (the Korean Proposal), "effectively lets off future Saddam Husseins or Pol Pots, who kill their own people on their own territory,"⁹⁹ from States that promoted in the Conference even stricter criteria for preconditions to the exercise of jurisdiction and were adamantly against universal jurisdiction or any variant thereof. As a result of not adopting the German or Korean Proposals, the ICC does, indeed, have less jurisdiction than domestic courts of any State would have.

It is safe to say that the ICC will come into operation within the next two years or so. As of May 2000 there are ninety-eight States that have signed and ten that have ratified.¹⁰⁰ Once the Rules of Evidence and Procedure and Elements of Crimes have been completed by June 30, 2000, it seems certain that many more States will ratify. As well, apart from awaiting the conclusion of the Preparatory Commission established since Rome on these issues, many States are in the process of enacting domestic legislation, or as a preliminary step debating what is in substance involved in order to be able to fulfill their obligations to cooperate with the ICC in good faith. This process necessarily takes time. In some States it requires not ordinary domestic legislation but constitutional change. Among the contentious issues are the surrender to the ICC of nationals by those States that ordinarily do not extradite such persons, the negation of immunity of Heads of State, other high ranking government officials and even members of parliament, and the acceptance of life imprisonment as a penalty.

During the PrepCom sessions during 1999 and March 2000, the United States, together with other participating States, has been working actively and constructively. Suggestions made after Rome that the preconditions to jurisdiction could be changed by the States Parties in a "binding interpretative statement"¹⁰¹ have not been pressed. This has been the case also with the

suggestion that a declarative statement could be made whereby third party jurisdiction would be suspended in the case where the State of nationality of the alleged offender is both able and willing to assume responsibility for criminal conduct which amounted to an official act.¹⁰² This would, it has been argued, simply "move the problem from the level of individual responsibility to that of exclusive state responsibility" and consequently involve "a total change of the parameters of responsibility"¹⁰³ that were envisaged in Rome. The United States would appear to have realized that to seek an amendment of the Rome Statute to abrogate the perceived problem that it has with Article 12 is unrealistic and would not meet with support. However, most recently before the March 2000 PrepCom, the United States made a *démarche* to other States in their capitals in which it recalled that it had identified in its mind a number of flaws in the Statute, but it was of the view that they could be dealt with in the Rules of Evidence and Procedure and Elements of Crimes. It reiterated its fundamental difficulty with Article 12 and how it would make it nearly impossible for the United States to give the ICC any measure of support if the Statute remains as it is. It focussed its concerns again on the official decisions of a sovereign non-State Party being subjected to the jurisdiction of the Court in cases where States that oppose United States' actions abroad make unfounded accusations. However, it was also the position of the United States that it shared the concern of other States that any provision dealing with the consent of such a non-State Party should not act as a vehicle for the alleged perpetrators of grave atrocities to escape justice before the new Court. This concern is indeed valid, but it is difficult to envisage how distinctions can be drawn between non-State Parties, so-called "rogue" States or otherwise. All non-Party States could utilize the United States perspective. It would seem that what the United States is promoting is a clarification of the preconditions issue in a supplemental document to the Rome Statute and in a Rule of Procedure. It seems that the supplemental document envisaged is the Relationship Agreement Between the United Nations and the ICC. This Relationship Agreement does not have to be completed by June 30, 2000. However, the Rule of Procedure would have to be. To date nothing has formally been put on the table. The proposal for the procedural rule relates to Article 98(2) of the Statute dealing with cooperation and consent to surrender to the ICC. Article 98(2) reads:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to

surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The United States proposal would require a footnote to the Rule of Procedure to Article 98. The currently informal proposal reads:

The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with its obligations under the relevant international instrument.

This would then relate to a future proposal by the United States for the supplemental document to be included in the Relationship Agreement Between the United Nations and the ICC which would utilize the possibility presented in the above proposed footnote to the Rule of Procedure. This proposal reads:

The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the sovereign direction of a U.N. Member State, and such directing State has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the U.N. Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply.

This is acutely controversial. Obviously, the best case scenario is for the United States to become a State Party. Nevertheless, although many States want to keep the United States positively engaged in the process of bringing the ICC into operation, among the Like Minded States and others there are definite concerns, notably not wanting the delicate balance achieved in Rome to be circumvented by the back door through an oblique Rule of Procedure to be followed at some later stage by the Relationship Agreement Article. The end result in reality would be that the ICC would only have jurisdiction with the consent of the State of nationality of the accused or the United Nations Security Council. The United States proposal appears to remove or at least restrict the jurisdictional provision concerning the State where the offence was committed. As was discussed earlier, Article 12 is in fact much narrower than what most States wanted in Rome and this new "informal" proposal to produce a "procedural fix" to enable the United States to cooperate with the ICC, at a minimum as a "good neighbour"¹⁰⁴ creates more concerns about further restrictions.

Furthermore, there are indeed very serious implications that the premise that war crimes and crimes against humanity committed "within the sovereign direction of a U.N. Member State" would not be in accord with the principle of international law as encapsulated in the Nuremberg Principles, that the "Act of State" plea is no defence.

The mandate of the PrepCom (1998-2000) is not to revise the Rome Statute but to elaborate on it and thereby to encourage general support by States. The Rules of Procedure and Evidence must be consistent with the Statute. Actual amendments to the Statute can only be done by a Review Conference of the Assembly of States Parties after the expiry of seven years from the entry into force of the Statute.¹⁰⁵ Another major fear is that the United States proposal would encourage certain States not to ratify as it would give them the power to block the ICC's jurisdiction. It would also negate a key compromise in Rome concerning the role of the Security Council in that the ICC would be subject to the veto of the P5 over prosecutions of non-State Party nationals, which would undermine the legitimacy of the Court as an impartial and independent judicial body.

Thus, the major and as yet unresolved problem is how to accommodate the concerns of the United States without undermining the integrity, credibility and effectiveness of the ICC. With such a "procedural fix," the United States has indicated in recent weeks that its "good neighbour policy" towards the ICC could "mature over the years into the real possibility of signature and ratification."¹⁰⁶ By June 30, 2000 we shall see, at least, the outcome of this new proposal concerning the Rules of Evidence and Procedure following debate if it is formally tabled. If this happens it is difficult to know whether States will accept the proposal to keep the United States on side, knowing that the Relationship Agreement connection can be negotiated later—or just refuse to agree to this procedural rule as a matter of principle.

The momentum is building and efforts worldwide are being made to ensure ratification and thus secure accountability and justice by an independent, impartial and effective Court. It would be an affront to humanity, the rule of law and to the modern struggle since 1947 to have established a permanent International Criminal Court, if it was to be rendered in real operational terms a nullity by procedural manoeuvres.

Notes

1. U.N. Doc. A/CONF.183/9, July 17, 1998.

2. D. Scheffer, *The United States and the International Criminal Court* (1999), 93 *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 12, 17–18; *International Criminal Court: The Challenge of*

Jurisdiction, PROC. ANN. MTG. A.S.I.L. (1999) (forthcoming). See also, S.A. Williams, "Article 12" in O. Triffter (ed.) COMMENTARY ON THE ROME STATUTE (1999), 329.

3. P. Kirsch & J.T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process* (1999), 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 2.

4. Report of the International Law Commission on the work of its forty-sixth session, U.N. GAOR, 49th Sess., Supp. No. 10, 29, U.N. Doc. A/49/10 (1994).

5. U.N. Doc. A/Conf. 183/2/ Add. 1, April 3, 1998.

6. See Bureau Discussion Paper, U.N. Doc. A/Conf. 183/C.1/L.53, July 6, 1998, 11–12 [then Article 7] and Bureau Proposal, U.N. Doc. A/Conf. 183/C.1/L. 59, July 10, 1998, 10–12 [then Articles 7 *bis* and 7 *ter*.]

7. See Article 13 (b).

8. Note the trial and execution of Conradin von Hohenstaufen in Naples in 1262 for initiating an unjust war, and the trial of Peter of Hagenbach at Breisach for "tramp[ling] under foot the laws of God and man." See G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1968), 23–59; M. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES (1965); M.C. Bassiouni & C. Blakesley, *The Need for an International Criminal Court in the New International World Order* (1992), 25 VAND. J. TRANS. L. 151; and L.C. Green, *Group Rights, War Crimes and Crimes Against Humanity* (1993), 1 INT'L GROUP RIGHTS 107.

9. July 19, 1899, 26 MARTENS NOUVEAU RECUEIL (2d) 720.

10. June 28, 1919, 11 MARTENS NOUVEAU RECUEIL (3d) 323. See Articles 227–229. It should be observed that in 1919 a Special Commission was set up by the allied powers to address, *inter alia*, crimes against humanity. This was of special significance due to the alleged annihilation of 1,000,000 Armenians by Turkey. Interestingly, the opposition of the United States to the inclusion of crimes against humanity resulted in their omission from a list of offences that an international tribunal would be given to prosecute. Interestingly, although the Treaty of Sèvres, between the Allied Powers and Turkey, August 10, 1920, (1921), 15 A.J.I.L. SUPP. 179, provided for the surrender of such persons, the subsequent Treaty of Lausanne between the same parties on July 24, 1923, 28 L.N.T.S. 11, gave them amnesty.

11. C. MULLINS, THE LEIPZIG TRIALS (1921), and M.C. Bassiouni, *Draft Statute International Tribunal* (1993), NOUVELLES ETUDES PENALES 7.

12. HUDSON, 7 INTERNATIONAL LEGISLATION 862.

13. The only State to ratify was India.

14. 82 U.N.T.S. 279. See also the earlier 1943 Moscow Declaration, 1943 DEPT. OF STATE BULL. 311.

15. 1948 15 ANN. DIG. 356.

16. U.N. GAOR V Supp. (A/1316), 11–14.

17. U.N.G.A. Res. 174(II), U.N. GAOR, 2nd Sess., U.N. A/519, 105 – 110 (1947).

18. M. Scharf, "The Politics Behind U.S. Opposition to the International Criminal Court," a paper presented at a conference on La Conférence de Rome et la Création de la Cour Pénale Internationale, Mission Interministerielle pour les Droits de l'Homme, Strasbourg, November 20–21, 1998, at 1, suggests that the 1953 Draft Statute was "extremely ambitious in the powers it conferred on the court." It "had the paradoxical effect of setting back the effort to create such a court," in that "the debate shifted from whether to establish an international criminal court to whether to adopt the 1953 Statute."

19. U.N.G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. 31, at 142; U.N. Doc. A/9631 (1974).

20. Report of the International Law Commission on the Work of its Forty-sixth Session, Draft Statute of an International Criminal Court, May 2–July 22, 1994, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10. Hereinafter “ILC Draft.”

21. The complaint was to be brought under Article 25 (1), *ibid.*, by a State Party which was also a contracting Party to the Genocide Convention, 78 U.N.T.S. 277, as envisaged by Article VI.

22. It must, however, be recognized that the ILC Draft reduced the conditions for the exercise of jurisdiction set out in its earlier 1993 Draft. See Report of the International Law Commission on the Work of its Forty-fifth Session, May 3–July 23, 1993, U.N. GAOR, 48th Sess., Supp. No. 10 (A/48/10). See J. Crawford, *The ILC's Draft Statute for an International Criminal Court* (1994), 88 AMERICAN JOURNAL OF INTERNATIONAL LAW, 140; C. Warbrick, *International Criminal Courts* (1995), 44 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 466; and C.L. Blakesley, *Jurisdiction, Definition of Crimes and Triggering Mechanism* (1997), 13 NOUVELLES ÉTUDES PÉNALES 177, 204.

23. The unlawful seizure of aircraft as defined by Article 1 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1972 Can. T.S. No 23; the crimes defined by Article 1 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1973 Can. T.S. No. 23; the crimes defined in Article 2 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1977 Can. T.S. No. 43; hostage-taking and related crimes as defined by the 1979 International Convention against the Taking of Hostages, reprinted in (1979), 18 I.L.M. 1456; the crimes defined in Article 3 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and by Article 2 of the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, reprinted in (1988), 27 I.L.M. 672.

24. E/CONF. 82/15, December 19, 1988, reprinted in (1989), 28 I.L.M. 497.

25. Article 21 (2).

26. See ILC Draft, Commentary to Article 22, 82. Note that in its 1993 Draft, the ILC Working Group had proposed two alternatives to this Article, which were based on “opting out.” *Ibid.*, 83. Under the “opting out” approach, the Court’s jurisdiction would have been accepted by all States Parties except for those crimes expressly designated.

27. *Ibid.*, 83.

28. M. Politi, *The Establishment of an International Criminal Court at a Crossroads: Issues and Prospects After the First Session of the Preparatory Committee* (1997), 13 NOUVELLES ÉTUDES PÉNALES 115, 149. See Report of the Ad Hoc Committee, U.N. GAOR, 50th Sess., Supp., No. 22 (A/50/22).

29. L.S. Wexler, *First Committee Report on Jurisdiction, Definition of Crimes and Complementarity* (1997), 13 NOUVELLES ÉTUDES PÉNALES 163, 173.

30. Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994, UNGAOR 49th Sess. Supp. No. 10 (A/49/10), 31, para. 48.

31. U.N. Doc. A/RES/49/53, December 9, 1994.

32. U.N. Doc. A/RES/50/46.

33. Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22 (A/51/22), vol. 1, 29.

34. See Politi, *supra* note 28, 149–150.

35. U.N. Doc. A/AC. 249/1998/L. 13, February 4, 1998.

36. U.N. Doc. A/AC. 249/1997/L.8/Rev. 1, 3, August 4–15, 1997.

37. U.N. Doc. A/Conf. 183/2/Add. 1, Articles 6 (b), 7, 9 (further option), and further option for Article 7.

38. For a useful background paper, see International Commission of Jurists, *Exercise of Jurisdiction and Complementarity*, I.C.J. BRIEF No. 2, June 1998.

39. P. Kirsch and J.T. Holmes, *supra* note 3, 9.

40. Customary international law is based on consistent State practice coupled with *opinio juris*, meaning that States view the matter as a legal obligation. See Article 38 (1) (b), Statute of the International Court of Justice, and the I.C.J.'s judgments in the *North Sea Continental Shelf* cases, [1969] I.C.J. Rep. 3; *The Asylum Case*, [1950] I.C.J. Rep. 266. Note also A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971).

41. The term "convention" is synonymous with "treaty."

42. C.C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability* (1996), 59 LAW AND CONTEMPORARY PROBLEMS 153, 167; K.C. Randall, *Universal Jurisdiction Under International Law* (1988), TEXAS LAW REV. 785 AND AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), sec. 404.

43. See H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes* (1944), 21 BRITISH YEARBOOK OF INTERNATIONAL LAW 58, 61.

44. But note that these piratical acts were committed on the high seas beyond the territorial jurisdiction of any State. Piracy *jure gentium* is to be distinguished from piracy at domestic law. As to the right of every State to seize a pirate ship or aircraft on the high seas or otherwise outside the jurisdiction of any State and arrest the persons on board, see Article 19, United Nations Convention on the Law of the Sea, 1982, U.N. GAOR, vol. XVII, 139, (1982), 21 I.L.M. 1245; *The SS Lotus* case (1927), P.C.I.J. Series A, No. 10, 70, per Justice Moore; and *In re Piracy Jure Gentium*, [1924] A.C. 586 (Sp. Ref. J.C.P.C.). Universality was necessary to fill the jurisdictional gap left by the other bases. But see Cowles, *Universality of Jurisdiction over War Crimes*, (1945) CALIFORNIA LAW REVIEW 177, who bases jurisdiction over war criminals by referring to piracy, and Schick, *International Criminal Facts and Illusions*, 1948 MODERN LAW REVIEW 290, who argues to the contrary. See also H. ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1977), 261-262.

45. See L.C. GREEN, INTERNATIONAL LAW (1984), 179. The assimilation of the slave-trader to the pirate probably stems from the fact that slave trading was declared by an Imperial Statute of the British Parliament to be piracy. (1824), 5 Geo. IV, c. 113, ss. 9-10. See *R. v. Zulueta*, 1 Cat. & K. 215, 1 Cox C.C. 20 and *Le Louis* (1817), 2 Dods. 210. There is no indication that the 1926 Slavery Convention, 60 L.N.T.S. 253, as amended by the Protocol of 1953, 182 U.N.T.S. 51, or the Supplementary Convention of 1956, Can. T.S. No. 7, subjected alleged perpetrators to universal jurisdiction. But for rights of visit on the high seas of suspected slave-trading ships, see Article 110 (1) (b) of the *United Nations Convention on the Law of the Sea* 1982, *ibid.* Note M.C. Bassiouni & V. Nanda, *Slavery and the Slave Trade: Steps Towards its Eradication*, (1972), 12 SANTA CLARA L. REV. 424.

46. The International Military Tribunal (IMT) at Nuremberg was established based on universal jurisdiction under the London Charter of August 8, 1945, 82 U.N.T.S. 279. The IMT stated in its judgment that the allied powers in signing the Charter had "done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law." (1948) 22 TRIALS OF THE MAJOR WAR CRIMINALS 461. See Article 6 (b) of the Charter. See also, e.g., under Control Council Order No. 10, *Trial of Otto Sandrock and Three Others* ("The Almelo Trial"), (1945), 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 35, 42; the "Hostages Case" (1947), 8 Case No. 47, 43; and the *Remmele Trial*

(1947), 15 L.R.T.W.C. 44. Note also the application of the principle for grave breaches of the four 1949 Geneva Conventions: Art. 49, Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31; Art. 50, Geneva Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Armed Forces at Sea, 75 U.N.T.S. 85; Art. 129, Geneva Convention (III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 and Art. 146, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 75 U.N.T.S. 287; Additional Protocol I of 1977, 1991 Canada Treaty Series No. 2 and Article 28 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 240. There is also national legislation to support universal jurisdiction as detailed in International Committee of the Red Cross, *Universal Jurisdiction vs. State Consent*, Doc. ICRC/NYC/, October 12, 1997, 2: see, e.g., the Geneva Conventions Act of Australia (1957 as am. 1991); the Geneva Conventions Act of Canada 1965; the Geneva Conventions Act of India 1960; the Belgian *Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977*. As well, States have adopted more general legislation referring to war crimes and universal jurisdiction without reference to the Geneva Conventions. See, e.g., s. 7 (3.71)(b) of the Canadian Criminal Code, and BRITISH LAW OF WAR ON LAND (BEING PART III OF THE MANUAL OF MILITARY LAW) (1958), Ch. XIV, para. 637, 180. Domestic prosecutions also evidence the use of universal jurisdiction: see *Polyukhovich v. Commonwealth of Australia* (1991), 172 C.L.R. 501, 562–3, 565 (Aust. H.C.). Note also in a civil claim context the discussion of universal jurisdiction in *Kadic v. Karadzic*, 70 F. 3d 232, 243 (2nd. cir. 1995).

47. As with war crimes, the IMT had jurisdiction over crimes against humanity. However, because of the grammatical construction of Article 6(c) of the Charter, the IMT restricted its jurisdiction to crimes against humanity connected to the conduct of the war: (1947), 1 TRIAL OF THE MAJOR WAR CRIMINALS 17; Secretary General of the United Nations, *Memorandum, THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL* (1949), 66. Prosecutions by the Allied Military Tribunals acting under Control Council Order No. 10 were not so restricted. See *Alstoetter et al., "The Justices Trial"* (1947), VI L.R.T.W.C. 1, 45–46. Domestic consideration includes *Attorney-General of Israel v. Eichmann* (1961–1962), 36 INT'L LAW REP. 26; *Demjanjuk v. Petrovsky*, 776 F. 2d 571, 582 (6th Cir., 1985); *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie*, (1983), 78 I.L.R. 125, 130 (Cass. Crim.); and *R. v. Finta*, (1994), 1 S.C.R. 701. Note also Article IV of the Apartheid Convention, G.A. Res. 3068 (XXVII), 28 U.N. GAOR, Supp. (No. 30), 75, U.N. Doc. A/9030 (1973); Article 5 (2) of the Torture Convention, 1987 Can. T.S. No. 36. In a civil case in the United States, *Filartiga v. Peña Irala*, 630 F. 2d 876 (2nd Cir., 1980), it was stated that those who commit torture are akin to pirates and enemies of all mankind.

48. The Genocide Convention, 78 U.N.T.S. 277, does not provide for universal jurisdiction *per se*, but for jurisdiction by the State where the offence was committed or by an international penal tribunal (article VI). However, the Convention does not prohibit States from using other bases of jurisdiction, and it has been argued that universal jurisdiction may be exercised on the basis of customary international law. As to what is not prohibited is permitted, see the *SS Lotus* case (*France v. Turkey*), *supra* note 44. Concerning genocide as a crime under customary international law, see *Reservations to the Convention on Genocide* (Ad. Op.) [1951] I.C.J. Rep. 23; *Barcelona Traction, Light and Power Company Case* (Prelim. Obj.) (Belgium v. Spain), [1970] I.C.J. Rep. 32; U.N.G.A. Res. 96 I; *Attorney-General of Israel v. Eichmann* (1961), 36 I.L.R. 18, 39 (Dist. Ct.); (1962), 36 I.L.R. 277, 304 (Supreme Ct.); and AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE LAW (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES* (1987), Reporter's Note on § 404, 256. Note L.R. Beres, *Genocide and Genocide-Like Crimes*, in

M.C. Bassiouni (ed.) *INTERNATIONAL CRIMINAL LAW: CRIMES*, vol. 1 (1986), 271, 275. It is submitted that the interest in and the prevention of genocide is an *erga omnes* obligation. See *Barcelona Traction*, *ibid.*, and C.C. Joyner, *supra*, note 42, 168.

49. *Amicus curiae* brief presented on behalf of the Government of the United States of America, July 25, 1995, in *The Prosecutor of the Tribunal v. Dusan Tadic* Case, No. IT-94-I-T, 20, as quoted in International Commission of Jurists, *supra* note 38, 5.

50. Tribunal for Former Yugoslavia, Case No. 17-95-17/1-T (1998), para. 153.

51. March 24, 1999, House of Lords (1999), 38 I.L.M. 581, 589.

52. The Rome Treaty Conference Monitor, July 10, 1998, 1-2.

53. E.g., International Committee of the Red Cross, International Commission of Jurists, Lawyers Committee for Human Rights, Amnesty International and Human Rights Watch.

54. Note that Germany also called this "the German version of automatic jurisdiction." See Statement by Hans-Peter Kaul, Acting Head of the German Delegation in the CW, July 9, 1998, 1. Thus, Germany used "inherent" and "automatic" in the same way to mean that the ICC was vested with universal jurisdiction upon ratification by States. This must be contrasted with the term "automatic" as used in the Korean Proposal, the United Kingdom Proposal, the Bureau Proposal, and in the final text of the Statute, where although acceptance of the Court's jurisdiction is automatic, there are preconditions. However, they did not require a second State consent as did the "opt-in" and State consent regimes.

55. Statement by Hans-Peter Kaul, Acting Head of the German Delegation, Rome Conference, June 19, 1998.

56. See Article 13 (b).

57. J.F. Bertram - Nothnagel, Report to the Union Internationale Des Avocats, August 12, 1998, 10.

58. Contrast the Statutes of the *Ad Hoc* Tribunals for the Former Yugoslavia and Rwanda, set up by U.N. Security Council Resolutions 827 of May 25, 1993, and 955 of November 8, 1994, acting under Chapter VII of the Charter, which obligate all States to cooperate.

59. U.N. Doc. A/CONF. 183/C.1/L.6, June 18, 1998. A similar proposal had been made earlier by Sweden: ICJ BRIEF, *supra* note 38, 4.

60. Terra Viva, *Seoul Floats a Compromise on Jurisdiction*, 22 June 1998, No. 6, 7. See also The International Criminal Court Monitor, July 10, 1998, 1, where it states that 79 percent of the States supported the Korean Proposal.

61. *Ibid.*

62. U.N. Doc. A/Ac. 249/WG.3/DP.1.

63. See e.g., Lawyers Committee for Human Rights, *Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction* (May 1998), 1 (8) INTERNATIONAL CRIMINAL COURT BRIEFING SERIES 5.

64. U.N. Doc. A/CONF.183/C.1/L.70, July 14, 1998.

65. See testimony of Ambassador David Scheffer, Head of the United States Delegation in Rome, before Senate Foreign Relations Committee, July 23, 1998.

66. 1969, 1155 U.N.T.S. 331.

67. Scheffer, *supra* note 65.

68. J. Podgers, *War Crimes Courts Under Fire* (September, 1998), AMERICAN BAR ASSOCIATION JOURNAL 64, 67.

69. Lawyers Committee for Human Rights, *Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction* (1998), 1(8) INTERNATIONAL CRIMINAL COURT BRIEFING SERIES, 3.

70. Human Rights Watch, JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN EFFECTIVE INTERNATIONAL CRIMINAL COURT (1998), 46.

71. U.N. Doc. A/CONF. 183/C.1/L.53, July 6, 1998, 11-13.

72. P. Kirsch and J.T. Holmes, *supra* note 3, 9.

73. U.N. Doc. A/CONF. 183/C.1/L.59, July 10, 1998, 10–12.

74. According to The Rome Treaty Conference Monitor, July 10, 1998, 2, “23 States displayed their dismay that universal jurisdiction was not reflected.” Note also the reaction of the German Delegation, as expressed in a statement by Hans-Peter Kaul, Acting Head of Delegation, in the CW on July 9, 1998, which was also one of dismay and reiterated the belief that their approach was legally sound “and acknowledged in international legal doctrine as well as through extensive State practice.”

75. P. Kirsch, *The Rome Conference on the International Criminal Court: A Comment* A.S.I.L. NEWSLETTER, Nov–Dec. 1998, 1, 8.

76. The United States had argued earlier for a ten-year transitional period for war crimes and crimes against humanity. Note that Article 124 is to be reviewed at the review conference to be convened seven years after the entry into force of the Statute, in accordance with Article 123. Those States participating in the Assembly of States Parties established in Article 112 will be eligible to be present.

77. The Rome Treaty Conference Monitor, July 18, 1998, No. 26, 2.

78. U.N. Doc. A/CONF. 183/C.1/L.90.

79. Proposed by Norway. Sweden and Denmark spoke for and China and Qatar against.

80. The new Preparatory Commission (PrepCom) set up by the United Nations General Assembly had four meetings between February 16–26, 1999, July–August 1999, November–December 1999, and March 2000. Its mandate includes defining aggression. Such a definition will then have to be adopted under the provisions dealing with amendments and review of the Statute, namely Articles 121 and 123. However, this is not subjected to the same time constraints as the drafting of the Rules of Evidence and Procedure and The Elements of Crimes which must be accomplished by the end of the June 2000 meeting.

81. In accordance with Article 14.

82. In accordance with Article 15.

83. At the outset of the Conference many delegations, including China, France, India, Mexico and several non-aligned States, had supported the “State consent” proposal, requiring consent even from States Parties for each prosecution.

84. The various United Nations Conventions dealing with international terrorism use these bases of jurisdiction along with passive personality and the presence of the accused (custodial State) to allow for extradition or prosecution by domestic criminal courts. See, e.g., Article 6 of the 1979 International Convention Against the Taking of Hostages, 1316 U.N.T.S. 205, and Article 6 of the 1997 International Convention on the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164.

85. *Compania Naviera Vascongado v. Steamship Cristina*, [1938] A.C. 485, 496, per Lord MacMillan. The ambit of the territorial principle has been interpreted in some domestic courts to allow for criminal prosecution when a significant portion of the elements, if not all, of the crime occur in the State. It is a real and substantial link test that is applied and it is in accord with the principle of international comity. See, e.g., the Canadian case of *Libman v. The Queen*, [1985] 2 Supreme Court Reports 178.

86. See, e.g., North Atlantic Status of Forces Agreement, 1951, 1953 Can. T. S. No. 13, and the Agreement Concerning the Jurisdictional Immunities of U.N. Forces Between the United Nations and Cyprus, 1964, 492 U.N.T.S. 57.

87. *Supra* note 84. Furthermore, the international terrorism conventions oblige States Parties to amend their domestic criminal law to provide for wide bases of jurisdiction over the offence, including the presence of the offender in its territory, and the obligation of *aut dedere, aut*

judicare, that is, to extradite or to submit the case to a State's own authorities for the purposes of prosecution.

88. See, e.g., Article 6(1) (a) of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988), 27 I.L.M. 672. Note L. Sadat Wexler (ed.), *Model Draft Statute for the International Criminal Court*, (1998), 13 NOUVELLES ETUDES PENALES 25, includes also the State of registration of spacecraft or space stations.

89. Once the preconditions of Article 12(2) have been met, other States Parties are obliged to cooperate with the ICC.

90. 1969, 1155 U.N.T.S. 331.

91. Note *United States v. Fawaz Yunis*, 924 F.2d 1086 (D.C. Cir., 1991). Here the United States prosecuted Yunis on the basis of the passive personality principle for hijacking and hostage taking. Lebanon, the State of nationality of the accused was not a State Party of either the International Convention Against the Taking of Hostages, *supra* note 23, or the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 23.

92. The argument that such delegation is either illegal or unprecedented has been put forward recently by D. Scheffer, *International Criminal Court: the Challenge of Jurisdiction*, *supra* note 1.

93. *SS Lotus* (France v. Turkey) (1927), P.C.I.J. Ser. No. 10.

94. See, e.g., the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1977 Can. T.S. No. 43, Article 3 (1) (b).

95. See Article 7[4], Article 9, option 1, para. 3, option 2, para. 4, and further option para. [2].

96. Article 7 *ter*.

97. Article 7 *ter*.

98. Lawyers Committee for Human Rights, *The Rome Treaty for an ICC: A Brief Summary of the Main Issues*, ICC BRIEFING SERIES, vol. 2 (1).

99. T. Meron, *The Court We Want*, WASHINGTON POST, October 13, 1998, reprinted in A.S.I.L. NEWSLETTER, Nov.-Dec. 1998, 9, and D. Scheffer, *America's Stake in Peace, Security and Justice*, A.S.I.L. NEWSLETTER, Sept.-Oct. 1998, 1, where he states that the ICC "could not on its own prosecute Saddam for massacring his own people."

100. Senegal, Trinidad and Tobago, San Marino, Italy, Fiji, Ghana, Norway, Belize, Tajikistan and Iceland.

101. R. Wedgwood, *The International Criminal Court: An American View* (1999), 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 97, 102.

102. *Ibid.*

103. G. Hafner, K. Boon, A. Rubesame and J. Huston, *A Response to the American View as Presented by Ruth Wedgwood* (1999), 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 108, 119.

104. Statement by Secretary of State Madeleine Albright, as reported in The Deseret News (Salt Lake City), May 6, 2000, p. A4.

105. Article 121.

106. Statement of Ambassador David Scheffer, as reported in The Deseret News (Salt Lake City), May 6, 2000, p. A4.